2. The Eleventh Circuit acknowledged that many authorities have defined "self-insured" plans to refer to a formal arrangement by which funds are set aside and accessed to cover future liabilities. Pet. App. at 43a. It nevertheless held that this definition—which had been adopted by every other court to consider the issue—was not dispositive because courts are required to "look to the regulations to which we owe deference," *id.* at 51a, and it read CMS regulations *sua sponte* to define "deductibles" as a form of self-insurance. *Id.* at 45a, 47a. The Eleventh Circuit accordingly concluded that a "combination of deductibles and insurance policies" may be "deemed by the regulations to constitute a self-insured plan" even if that definition of self-insurance departs from the customary meaning of the term. *Id.* at 51a-52a. The Government avoids any effort to defend this reasoning. As it undoubtedly knows, the agency's own regulations provide no support for this conclusion.

First, the Government never acknowledges that the Eleventh Circuit held that the purchase of a policy with "deductibles" can constitute a plan of self-insurance. It instead describes the issue as whether an entity could be self-insured in part by "purchasing excess insurance that is triggered after a liability threshold is met." Opp. at (I). But the complaint does not allege and the Eleventh Circuit does not base its ruling on the purchase of "excess insurance policies."[1] The Eleventh Circuit instead interprets the Government's allegations to be that Petitioners purchased insurance policies with deductibles, and bases its legal holding on that premise. *See* Pet. App. at 42a n.19, 47a, 51a.

Second, the Government offers no response to Petitioners' showing (Pet. at 20-22) that the Eleventh

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[1] "Excess Insurance" refers to "a form of additional protection ... purchased by the insured ... which by its terms will only come into play once the limits of the primary policy have been exhausted." 1 Eric Mills Holmes & Mark S. Rhodes, *Holmes's Appleman on Insurance* § 2.16, at 323 (2d ed. 1996).

Circuit completely misunderstood the meaning of the regulation that defines a "deductible" as a "liability insurance payment." The Government's silence can only be understood as a concession that the regulation *does not define deductible payments as a form of self-insurance.* Yet this "deductible" regulation was the centerpiece of the Eleventh Circuit's rejection of *Goetzmann*'s interpretation of a self-insured plan. Pet. App. at 45a, 47a, 51a.

Third, CMS has *required* a set aside of funds to qualify as a self-insured plan in a related context and squarely rejected the view that a deductible is a form of "self insurance." Under both Parts A and B of the Medicare laws, CMS reimburses certain costs incurred by health care providers (42 U.S.C. § 1395x(v)), including contributions made to a "self-insurance program" to cover future liabilities. 42 C.F.R. § 413.100(c)(2)(viii). These CMS regulations recognize that self-insurance "is a means by which a provider . . . undertakes the risk of protecting itself against anticipated liabilities *by providing funds in an amount equal to anticipated liabilities*, rather than by purchasing insurance coverage." *Id.* § 413.100(b)(2) (emphasis added). And the CMS Medicare Provider Reimbursement Manual requires *an advance set-aside of funds* with a "recognized independent fiduciary" to qualify as a "self-insurance program." CMS Pub. 15-1 § 2162.7(B) (http://www.cms.hhs.gov/manuals/pub151/PUB_15_1.asp).

The Manual also confirms that an insurance policy with a deductible would not constitute partial self-insurance due to the absence of a set-aside. *Id.* §§ 1262.4, 2162.7(B)(2) (requiring a fiduciary who, *inter alia*, "must have legal title to the fund and be responsible for proper administration and control"). The fact that the agency has adopted the customary definition of self-insurance when it is footing the bill for the costs of a self-insured plan directly undermines the Eleventh Circuit's view that the regulations *required* it to depart from the ordinary meaning of the term "self-insured plan."

Finally, the Government makes no effort to support the Eleventh Circuit's conclusion that Petitioners may have "received payment" under the MSP because they are "private insurers" within the meaning of CMS regulations. Pet. App. at 68a-69a & n.40 (quoting 42 C.F.R. § 411.24(g)). The Government simply ignores the Eleventh Circuit's reasoning and asserts that Petitioners are liable because they "received payment" in their capacity as "insureds." Opp. at 16-17. As the Eleventh Circuit implicitly recognized, that conclusion is not supported by the regulations which set forth a long list of the parties potentially responsible as entities that "received payment." And the terms "insured" or "tortfeasor" appear nowhere on the list. 42 C.F.R. § 411.24(g). That omission makes perfect sense because an insured tortfeasor—unlike the parties identified in the regulation—does not receive insurance proceeds pursuant to rights based in subrogation.[2] *See* Pet. at 24-25. Thus, the Government's litigating position is again divorced from the text of the agency's own regulations.

3. The Government asserts that review of the questions presented in the petition is no longer necessary because "the issues have been resolved by the December 2003 amendments to the Medicare Secondary Payer statute." Opp. at 10-11. To begin with, the 2003 amendments only amend the definition of a self-insured plan for an "entity that engages in a business, trade, or profession." Opp. at 9-10. The divergent interpretations of "self-insured plan" adopted by the circuits will accordingly continue to govern the MSP liability of every individual tortfeasor who settles a claim with a Medicare beneficiary. In the Eleventh Circuit,

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[2] The sole exception is the beneficiary who has received the Medicare benefits from the Government on the condition that the Government is subrogated to the beneficiary's rights to recovery from other sources. *See Waters v. Farmers Tex. County Mut. Ins. Co.*, 9 F.3d 397, 400-01 (5th Cir. 1993) (the Government, whether pursuing its recovery pursuant to a direct cause of action under § 1395y(b)(2)(B)(ii) or a subrogation cause of action under § 1395y(b)(2)(B)(iii) "stands exactly in [the beneficiary's] shoes when recovering from the available insurance funds").

an individual who carries insurance with a deductible—but does not set aside funds in advance to cover anticipated liabilities and establish procedures for paying claims—will have obligations to the Government under the MSP. In the Second and Fifth Circuits, an individual in identical circumstances will have no liability to the Government.

Nor have "the issues . . . been resolved" for businesses. The Government does not deny that its interpretation of the MSP will impose liability on thousands of individuals and businesses who participated in settlements prior to the effective date of the amendments, as explained in the Petition at 26-28; that these individuals and entities *would not have been liable* under the definition of a self-insured plan adopted in the Fifth and Second Circuits; and that the threshold issue in a constitutional challenge to these retroactive changes in the MSP will necessarily be the correct interpretation of the provisions interpreted by the Eleventh Circuit in this case. *See* Pet. at 29-30. Thus it is crystal clear that the Eleventh Circuit's decision in this case will continue to control the issues on remand in this action despite the amendments.[3]

The Government tries to minimize the seriousness of these issues. It first asserts that "Congress has expressed its view that the 2003 amendments clarify, rather than change, the MSP statute" by including a title that describes the provisions in Section 301(b) as "Clarifying Amendments To Conditional Payment Provisions." Opp. at 11. Nothing in this Court's cases, however, suggests that the use of the term "clarifying" in the title of the amendments establishes

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[3] Some courts may reject the Government's reading of the amendments and decline to interpret the new law to "deem" that a business which insures future liability through the purchase of insurance policies with deductibles is maintaining any "self-insured plan." In order to reach that result, a court would have to interpret the meaning of the statute prior to the amendment. *See, e.g., Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 341 (1999) (construing amendment narrowly in light of proper interpretation of statutory language prior to amendment).

that there has not been a retroactive change in the law. To the contrary, this Court has repeatedly declined to defer to the views of a subsequent Congress concerning the meaning of a statute adopted by a prior Congress.[4]

It takes little analysis to conclude that the amendments work a sea change in the law. For example, the amendment provides that any entity that fails to obtain insurance is "deemed" to have a "self-insured plan." MMA, Pub. L. No. 108-173, § 301(b)(1), 117 Stat. 2066, 2222 (2003). In 1989, CMS interpreted the pre-amendment version of the MSP quite differently, concluding that "the mere absence of insurance purchased from a carrier does not necessarily constitute a 'plan' of self-insurance." 54 Fed. Reg. 41,716, 41,727 (Oct. 11, 1989). The Eleventh Circuit, the Fifth Circuit, and the Second Circuit all have held, citing the 1989 CMS ruling, that the mere failure to purchase insurance does not mean an alleged tortfeasor is self-insured. *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 894, 895-96 (11th Cir. 2003); *Goetzmann*, 337 F.3d at 497 n.33; *Mason*, 346 F.3d at 41. Yet the 2003 amendment changes the law so that all entities that fail to obtain insurance *are* necessarily self-insured.

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[4] *See O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988) (applying same principle even where Congress seeks to clarify earlier law's "original meaning"; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (same). The cases cited by the Government (Opp. at 12) are not to the contrary. *See Loving v. United States*, 517 U.S. 748, 770 (1996) (holding that the meaning of the statute was confirmed by other statutes); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980) (refusing to hold that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight," and resting its holding upon the canon that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81, 382-83 (1969) (relying on additional considerations to interpret the earlier statute that are inapposite here, including the fact that a contrary interpretation would have rendered it meaningless).

The Government further suggests that a constitutional challenge to the retroactive imposition of liability on Petitioners would not succeed because "[t]he government put petitioners on notice in 1994 . . . that . . . reimbursement was required under the MSP statute" (Opp. at 12) but "[t]he RSP did not . . . provide for reimbursement of the federal government's Medicare payments." Opp. at 4. That characterization ignores the record. As explained in the Petition at 4-6, Judge Pointer ensured that the RSP was administered in a manner that would provide for reimbursement to Medicare and other insurers by permitting the interception of benefits once the Claims Office determined who was eligible for payments from the fund. Other insurers, including state agencies, received reimbursement in this manner, but the Government never sought recovery. Thus, Petitioners reasonably believed that the interests of the United States were fully protected by the terms of the settlement structure adopted by Judge Pointer and there was nothing in the text of the MSP or the Government's implementing regulations that purported to impose liability on a settling tortfeasor. A retroactive change in the law would accordingly work a fundamental impairment of Petitioners' rights.

4. The Government requests this Court to deny the petition because the decision below is interlocutory and remand proceedings will result in a further development of the record. Opp. at 11-12. Both propositions are true, but neither support the conclusion that review of the issues presented would be premature. To the contrary, the issues here are questions of law that do not depend on the facts, and this Court has long recognized its authority to resolve interlocutory issues that are "fundamental to the further conduct of the case." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964) (interlocutory review warranted where "the eventual costs, as all the parties recognize, will certainly be less if we now pass on the

questions presented here rather than send the case back with those issues undecided").

As the decision of the Fifth and Second Circuits make plain, the "pivotal" question under the MSP at the time Petitioners settled the claims at issue—and the pivotal question even today for individual tortfeasors—is whether they can be liable as "self-insured plans" if they did not establish *ex ante* funds and procedures for covering anticipated future liabilities. In the Fifth and Second Circuits, complaints that did not allege such facts were dismissed as a matter of law; in the Eleventh Circuit those facts are irrelevant to proof of liability. Thus, if this Court resolves the conflict by approving the definition of self-insured plan adopted in the Fifth and Second Circuits, Petitioners will have refuted the Government's assertion that the MSP amendments merely serve as a "clarification" of the prior law and prevailed on an issue that they effectively concede is "fundamental to the further conduct of the case." *Gen. Motors*, 323 U.S. at 377; *see* Pet. at 26-30.

There is accordingly no question that "the eventual costs" to the litigants and the judicial system, *Gillespie*, 379 U.S. at 153, would be far greater if Petitioners are forced to proceed with voluminous discovery and years of litigation in a case that should have been dismissed on the basis of undisputed facts at the pleading stage. Moreover, the conflict on this issue will have to be resolved eventually because it continues to determine the rights and liabilities of thousands of individuals and entities who entered into settlements before the amendments and every individual tortfeasor who settles claims with Medicare beneficiaries after the effective date of the amendments. Postponing review accordingly serves no purpose and will merely breed confusion for years to come.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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